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Supreme Court, U.S.
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NO. 06-

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 2006

CAPTAIN SHERIFF SAUDI,

Petitioner,

VS.

NORTHROP GRUMMAN CORPORATION, NEWPORT NEWS SHIPBUILDING, INCORPORATED, NEWPORT NEWS DRY DOCK AND SHIPBUILDING, INC., AND KEPPEL GROUP CORPORATION, d/b/a KEPPEL OFFSHORE & MARINE, LIMITED, d/b/a KEPPEL SHIPYARD (PTE), LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Northrup Grumman is believed to be a publicly-held corporation. Northrup Grumman owns 100% of Newport News Shipbuilding, Inc. and Newport News Dry Dock and Shipbuilding, Inc. Keppel Group Corporation, d/b/a Keppel Offshore & Marine, Limited, d/b/a Keppel Shipyard (Pte), Ltd., is believed to be a publicly-held corporation.

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Captain Sheriff Saudi, files this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division.

OPINIONS BELOW

A copy of the Judgment of the United States Court of Appeals for the Fourth Circuit affirming the Decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, is attached as Appendix A.

A copy of the Opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of Virginia, Norfolk Division, is attached as Appendix B.

A copy of the Judgment and Amended Judgment of the United States District Court for the Eastern District of Virginia are attached as Appendix C and Appendix D, respectively.

STATEMENT OF JURISDICTION

This is a civil appeal from a Decision of a United States District Court and a Federal Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The District Court had jurisdiction over Petitioner's claims under 28 U.S.C. §1333. Appeal was properly taken by Petitioner to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §1291 and Rule 4 of the Fed.R.App.Proc.

SUMMARY OF THE CASE

A portside hose crane collapsed on the S/T Marine Atlantic on May 17, 1999 during lightering operations in the Gulf of Mexico. Petitioner, Captain Sheriff Saudi, who was being off-lifted by the crane to a smaller tender vessel as part of lightering operations suffered severe injuries.

The vessel S/T Marine Atlantic was, along with her sister ship, the S/T Marine Pacific, fabricated and constructed in the Newport News Shipyards in 1979.

The owner of the Newport News Shipyards ordered the portside hose crane (which catastrophically failed some twenty years later) from the Appleton Machine Company in Appleton, Wisconsin. Appleton shipped the crane to a warehouse at the Newport News Dry Dock facility. Sometime thereafter, the portside hose crane was removed from storage and installed on board the vessel by Newport News Dry Dock. Dry Dock personnel claim they tested the crane after it was installed and then released it to maritime

use.

In about 1981, the vessel S/T Marine Atlantic was anchored in a bay in Malaysia and deactivated. It remained there until the early part of 1993 when a "team" headed by American company, Marine Transport Lines, traveled to the vessel and assessed it for reactivation. A Bermudan corporation, Marine Atlantic, Ltd., purchased the vessel and moved it to the Keppel Shipyards where it was supposedly refurbished. Thereafter, the vessel was placed in maritime service for charter. (TR. Vol. 1, Oct. 12, 2004, P.87a, LL 4-9).

During 1999, Koch Petroleum Group, Ltd. chartered the S/T Marine Atlantic for lightering operations in the Gulf of Mexico.

On May 17, 1999, Petitioner Saudi suffered serious injuries when the portside hose crane used to off-lift him to the motor vessel Discovery failed and dumped him into the Gulf of Mexico. The crane lost its arm which free fell,

struck the side of the vessel, broke off, and followed Saudi into the waters.

Newport News Shipbuilding, Inc. and Northrop Grumman, Inc., were initially sued by Saudi in an Original Complaint filed in the District of Columbia. (Dkt No. 1). Newport News Shipbuilding, Inc. ("NNS") and Northrop Grumman Corporation ("NG") filed various summary judgment motions that were not successful. (Dkt Nos. 47 and 90). NNS and NG also filed motions seeking sanctions for alleged discovery abuse, but failed to file Rule 26(a) F.R.Civ.Proc. Disclosures until the Court instructed Saudi to file a Motion to Compel. (TR. Vol. June 14, 2004, P. 67a, LL 19-25; P. 68a, LL 1-11).

Saudi filed a Motion seeking an enlargement of time within which to disclose his experts under Rule 26 F.R.Civ.Proc.

(App. Tab 25, Dkt. 73, P. 243-249).

The Court granted this extension and instructed Saudi to disclose the names and opinions of three expert witnesses who would provide testimony for the Plaintiff at trial. (Dkt. No. 82).

Saudi timely complied with the Court's order. (TR. Vol. Oct. 12, 2004, P. 88a, LL 10-25). Notwithstanding this timely compliance, NNS and NG filed a Motion to Strike Saudi's Amended Designation of Experts. (App. Tab 27, Dkt No. 77, P. 260-261). Saudi also filed a Motion to Compel NNS and NG to designate a witness with knowledge concerning the crane that injured him along with a Motion for Leave to Amend. (App. Tab 30, Dkt No. 86, P. 272-293). The Court never acted on Saudi's Motion for Designation despite the fact that the witnesses NG and NNS produced in response to Saudi's earlier designation professed a total lack of knowledge concerning the crane which had been placed on board the S/T Marine Atlantic

when it was built and which injured Saudi. (App. Tab 30, Dkt No. 86, P. 272-293).

When NNS and NG urged a Second Motion to Strike Saudi's Expert Witnesses at the pretrial conference based on Saudi's failure to select two of his expert witnesses, Wyman and Morgan, out of the original thirty Saudi had attempted to designate before the trial, the District Judge responded:

> The other two who weren't among the original 30 that he identified, I'm not sure what to say about that because I think what you say is you assume that that's where they've come from because he picked three out of the 30 instead of coming up with new people. I don't know what to say about that at this point.

(TR. Vol. September 24, 2004, Pretrial Conf., P. 70a, LL 18-24).

Prior to even filing the Motions to Strike Saudi's Disclosed Experts, Respondents' counsel Stauffer took it upon himself to contact some of the experts to determine whether "they intended to testify for Plaintiff." The ones he

contacted then refused to act as Saudi's experts. (TR. Vol. August 4, 2004, P. 71a, LL 9-14).

At trial the Court commented on its order enlarging time:

> Now you did not tell me at that hearing that you were going to seek two people that were not on your list so I did not have an opportunity to react to that. You just did it. You just picked people which you had previously not identified.

The clear wording of the Court's prior order did not restrict Saudi to a choice of experts out of the previous experts he had tried to list. Despite that fact, the Trial Court struck Saudi's two design defect experts, Wyman and Moran, and effectively terminated the litigation in NNS and NG's favor. (TR. Vol. 1, October 12, 2004, P. 92a, LL 11-23).

The Court imposed this outcome determinative sanction despite the disclosure of these witnesses prior to trial and the fact that Respondents had been able to take their depositions. (TR. Vol. 1, October 12, 2004, P. 90a, LL 5-21).

The Trial Court also refused to issue subpoenas so that Saudi, who had been designated as a pro se litigant with limited access to court process, could obtain the trial

testimony of the adverse expert witnesses Respondents designated. (TR. Vol. 1, October 12, 2004, P. 89a, LL 2-19).

These actions unfairly and illegally deprived Petitioner Saudi of the expert testimony he needed to meet his burden of proof on the design defect and failure to warn issues. The Court ultimately granted NNS' and NG's Motion for Judgment on Partial Findings Under Rule 52(c) Federal Rules of Civil Procedure based on lack of expert testimony supporting Saudi's case. (TR. Vol. 2, October 13, 2004, P. 96a, LL 1-19).

The expert witness reports of the excluded experts were submitted into the record as an offer of proof for "purposes of appeal." (TR. Vol. 2, October 13, 2004, P. 94a, LL 3-24 and Exhibit 40).

Respondents conceded the importance of the excluded testimony when they admitted that Saudi's other expert, Dr. Mahmoud, could testify only to the issues in the case pertaining to the effect of corrosion. When Moran and Wyman were struck, Saudi was left without an expert witness to testify on defective design and failure to warn. (TR. Vol. 2, October 13, 2004, P. 95a, LL 5-22).

STATEMENT OF THE CASE

1. A FEDERAL COURT CANNOT IMPOSE A RULE 37 F.R.CIV.PROC. SANCTION IN THE ABSENCE OF PROOF THAT THE SANCTIONED PARTY HAS VIOLATED THE TERMS OF A SPECIFIC ORDER.

STANDARD OF REVIEW

This Court has never reviewed the issue of whether a sanction in a civil case, which effectively terminates the litigation, must be based on proof of violation of the terms of a specific order.

However, the Court has held that expert witnesses may not be precluded from testifying in a criminal case without proof of violation of the terms of a specific order. Taylor v. Illinois 484 U.S. 400, 412 (1988). This Court has also required proof of violation of the terms of a specific order in reviewing civil contempt findings. Mine Workers v. Bagwell, 512 U.S. 827, 840 (1994).

In the Fourth Circuit, the Court of Appeals reviews the decision of the District Court to admit or exclude evidence for an abuse of discretion. Westberry v. Ab, 178 F.3d 257, 261 (4th Cir. 1999). Citing General Electric Co.

v. Joiner, 522 U.S. 136, 139 (1997). A District Court abuses its discretion if its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding. See Koon v. United States, 518 U.S. 81, 100 (1996) and United States v. Barber, 119 F.3d 276, 283 (4th Cir.) (en banc).

Even if a District Court applies correct legal principles to adequately supported facts, the discretion of the Trial Court is not boundless and subject to automatic affirmance. An Appellate Court is not a rubber stamp for orders of lower Courts. Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 506 (4th Cir. 1977).

Due to the crucial importance of expert testimony in cases where expert testimony is required to prove causation, many Circuits have formulated a test that must be satisfied before such a sanction can be imposed. When sanctions excluding evidence are outcome determinative, they are tantamount to a dismissal with prejudice. Dismissal with prejudice is a harsh sanction that runs counter to the strong policy favoring the disposition of

cases on the merits. Figueroa Ruiz v. Alegria, 896 F.2d 645, 647 (1st Cir. 1990).

The draconian sanctions imposed in this case were based on Rule 37 of the Federal Rules of Civil Procedure. Civil Rule 37 requires that a Court order specifically compelling discovery be entered and then transgressed before a dismissal can ensue. R.W. Int'l. Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 (1st Cir. 1991). Rule 37 does not permit the District Court to jump directly to the most dire sanctions without assessing an intermediate or first step. To the contrary, Rule 37's "language clearly requires two things as conditions precedent in order to engage the gears of the rule's sanction machinery: a Court order must be in effect and then must be violated, before the enumerated sanctions can be imposed. R. W. Int'l. Corp., 937 F.2d at 15.

The United States Court of Appeals for the Federal Circuit adopted the same rule and observed in Genentech, Inc. v. U.S. Int'l. Trade Comm., 122 F.3d 1409, 1422 (Fed. Cir. 1997).

> While we are hesitant to constrain the ITC to imposing sanctions only when an order to compel has been violated, our precedent is clear that before the sanction of dismissal may be imposed, the offending party must have notice of the alleged discovery misconduct and be given an opportunity to comply.

Citing Ingalls Shipbuilding, Inc. v. United States, 857 F.2d 1448, 1455 (Fed. Cir. 1988) (Requiring a predicate warning order setting out the party's deficiencies before sanctions can be imposed).

The Federal Circuit has adopted the Second Circuit's position set out in Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1363 (2d Cir. 1991) (Stating that Rule 37 requires, as a predicate for sanctions, a clearly articulated order of the Court requiring specified discovery).

Here, the District Court made no finding of bad faith or motive to mislead Respondents. The exclusion of critical evidence is an extreme sanction not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent. Dudley v.

South Jersey Metal, Inc., 555 F.2d 96, 99 (3d Cir. 1977). In weighing the sanctions to be imposed, the Trial Court must consider how important such testimony is or might have been and how critical is its absence. Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894, 904-905 (3d Cir. 1977).

The Meyers factors considered by the Third Circuit which may support exclusion of evidence include:

> (1) prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case...; and (4) bad faith or willfulness in failing to comply with the Court's order.

Meyers at 904-05. Here, Saudi sought and received an enlargement of time from the Trial Court to disclose experts under Rule 26 Federal Rules of Civil Procedure. Saudi filed a specific motion that the Court granted. The expert witnesses which Saudi disclosed were deposed by Appellees before trial. There was no prejudice. The District Court conceded it had not specifically limited

Saudi to a selection of three experts out of the initial thirty which he had attempted to disclose before the Court granted his motion to enlarge time.

The exclusion of Saudi's two witness, Wyman and Moran, on whom Saudi relied to provide proof of causation in support of his defective design and installation claims was not only an abuse of discretion, but also violated the proper legal interpretation accorded to Rule 37 by all of the Circuits.

In Meyers, the Third Circuit was faced with a situation where a Trial Court had excluded critical evidence which resulted in termination of the litigation in favor of the party seeking exclusion. The Third Circuit in Meyers noted that any possible prejudice to the complaining party was:

> Minimized not only by Pennypack's familiarity at least with Sweeney, its former president, but by the sequence of events. The letter to which Pennypack objected so strenuously followed by only three days Meyers' filing of his amended pretrial memorandum to which Pennypack voiced no objection. **More importantly, there remained after the letter was sent almost three weeks before trial. Yet, Pennypack**

> **made no effort to depose or serve interrogatories on the new witnesses or even to request Meyers' counsel to furnish additional information or written statements of the proposed testimony.**

Meyers at P. 905.

In sharp contrast to Meyers where the Third Circuit reversed the evidentiary exclusion of undeposed witnesses, Respondents took the deposition of Saudi's excluded experts, Wyman and Moran. A close reading of Meyers supports the conclusion that there was no basis at all for entry against Saudi of any sanctions based on Saudi's filing of a Motion to Enlarge Time Within Which to Make Rule 26 Disclosures, the Trial Court's Order which allowed Saudi to list three experts without limiting them to the "pool" interpretatively suggested by Respondents' counsel and Saudi's full compliance with the required disclosures concerning the three witnesses as directed by the Trial Court's order.

A Court should impose the least severe sanction necessary to insure prompt and complete compliance with its discovery order(s). United States v. Turner, 871 F.2d

1574,1580 (11th Cir. 1989). Contrary to Respondents' arguments in the Trial Court, the Court had already sanctioned Saudi when it granted his enlargement of time. The Trial Judge limited Saudi to only three experts on causation and made it clear he was doing so because of Saudi's late designation. (TR. Vol. August 4, 2004, P. 70a, LL 3-5; P. 72a, LL 2-13):

> Court: And because of your lateness, I am going to limit you to three. That does not mean you have to have three. You can have none, one, two, or three, but not more than three and you will have to have the information to the Defendant by August 12.

(TR. Vol. August 4, 2004, P. 72a, LL 2-25).

A continuance is the preferred sanction for any discovery delay. Respondents never asked for a continuance; therefore, their claims of prejudice have no weight. Lemaire By and Through Lemaire v. U.S., 826 F.2d 949 (10th Cir. 1987).

The Trial Court clearly abused its discretion when it excluded the trial testimony of Saudi's two expert

witnesses, Moran and Wyman.

2. A FEDERAL COURT IS REQUIRED TO TRANSFER VENUE OF AN ACTION TO AVOID THE BAR OF LIMITATIONS.

Keppel's eleventh hour admission that it operated a subsidiary in Brownsville, Texas, led to Saudi's to request that the Court transfer the case to the Southern District of Texas, Brownsville Division, so it could be pursued there. The Court denied Saudi's request claiming that he should refile his claims against Keppel there if he wished to pursue them. (TR. Vol. March 29, 2004, P. 64a, LL 1-25).

Here, Saudi was required to bring his claims within three years of May 17, 1999 under the three-year admiralty statute of limitations. By the time the District Court signed a judgment granting Keppel's Motion to Dismiss for Lack of Personal Jurisdiction on April 6, 2004, the three-year statute of limitations had long expired. (App. Tab. No. 13, Dkt. No. 45, P. 109-222).

Saudi requested that the District Court transfer venue of his claims against Keppel to the United States District Court for the Southern District of Texas, Brownsville Division, when proof of the possible existence

of personal jurisdiction had surfaced. In a classic misstatement of the law, the District Court, in rebuffing Saudi, stated:

> No, it is not allowing you to transfer it. You can bring an action in Brownsville, if you want, and you can argue the time it has been pending in this Court should not count against the time that you're filing it. You can make that argument if you file it in Brownsville or in New Jersey or wherever else you think you might be able to file it.

(TR. Vol. March 29, 2004, P. 64a, LL 1-7).

In refusing to transfer Saudi's case, the Trial Court ignored the clearly-established Federal Rule that venue of a case under 28 U.S.C. §1406(a) should be transferred to another District where it could have been brought where transfer will prevent the bar of limitations resulting from dismissal. Carteret Sav. Bank, FA v. Shushan, 919 F.2d 225, 228 (3rd Cir. 1990). Citing Goldlawr, Inc. v. Heiman, 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962). See also Delaware Marketing Partners, LLC v. Creditron Financial Servs., Civ. No. 04-36-SLR (Del. 2004).

REASONS FOR GRANTING THE PETITION

1. A conflict exists among the circuits as to whether an outcome determinative sanction under Rule 37 F.R.Civ.P may be imposed as a discovery sanction in the absence of proof that the terms of a specific order have been violated.

2. This Court requires violation of the terms of a specific order before a witness in a criminal case can be precluded from testifying or a party may be held in civil contempt.

3. If personal jurisdiction may exist in another district, a Federal Court must transfer venue to that district if failure to make such a transfer would bar refiling.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. The Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit should be reversed and this cause remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe Alfred Izen, Jr., certify that on Monday, the 27th day of March, 2006, one true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to the following persons and addressed to:

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by depositing same enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service and that on the same date as above, I sent to this Court the same Petition for Writ of Certiorari through the United States Postal Service, postage prepaid.

All parties required to be served have been served.

_____
Joe Alfred Izen, Jr.